UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

LEAGUE OF CONSERVATION VOTERS, ET AL.,	)
Plaintiffs,	)
vs.	) CASE NO. 3:17-cv-00101-SLG
DONALD J. TRUMP, ET AL.,	)
Defendants.	)

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE SHARON L. GLEASON, DISTRICT JUDGE
November 8, 2017; 10:00 a.m.
Anchorage, Alaska

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(Call to Order of the Court at 10:00 a.m.)

DEPUTY CLERK: All rise. Her Honor, the Court, the United States District Court for the District of Alaska is now in session, the Honorable Sharon L. Gleason presiding.

Please be seated.

THE COURT: Good morning. Please be seated. We're on record again in the League of Conservation Voters, et al. versus Trump, et al. I have a group of people here. Are you, sir -- why don't you tell me who you are.

MR. LAWRENCE: I'm Nathaniel Lawrence with the National Resources Defense Council, along with my co-counsel, Erik Grafe. We represent the plaintiffs.

THE COURT: All right. Very good.

MR. GRANT: Good morning, Your Honor. Eric Grant, U.S. Department of Justice for the federal defendants.

THE COURT: All right. Very good.

MR. ROSENBAUM: Steven Rosenbaum for defendant intervenor American Petroleum Institute.

THE COURT: All right. Very good.

MS. DOUGLAS: Jennifer Douglas, Alaska Department of Law.

THE COURT: Very good. Well, I entered the

order on the time, and I gave the defendants a half hour. I figured you would divide it among yourselves in a way. I assume you've done that.

MR. GRANT: We have, Your Honor.

THE COURT: Very good. Then who am I going to hear from first?

MR. GRANT: You'll hear from me, Your Honor.

THE COURT: All right. Very good.

MR. GRANT: Good morning again, Your Honor. You gave us a combined total of 30 minutes. I would like to take 22, and give eight minutes to the private intervenor defendants. With the Court's indulgence, I would like to reserve five minutes for rebuttal time.

THE COURT: All right. Very good.

MR. GRANT: The federal defendant's motion to dismiss has numerous facets, but they all represent different ways of making the same point.

There is a time and place for a Court to review the legality of Section 5 of Executive Order 13795, but that time and place is not right now in this court.

THE COURT: Let me ask you a question, Mr. Grant, and that is: Let's assume that instead of the language that is in the statute there was a provision that said, the President may from time to time withdraw land from consideration, but once he does so,

or she, it can never be added back in?

What if that were the provision and we had this case here?

MR. GRANT: Well, Your Honor, I think that would change the calculus on the merits. Of course, we're here on the motion to dismiss on jurisdictional pre-merits defenses, components of standing, like ripeness, sovereign immunity, whether Congress has granted plaintiffs a cause of action in these circumstances.

So I think essentially, our arguments would be the same, and we would say to the, Court when, at the appropriate time, plaintiffs with standing were to challenge the legality of that action in the District of Columbia Circuit on a five-year leasing plan, in the regional courts of appeals, we would have a harder time.

But those are the times and places where plaintiffs with standing, plaintiffs who suffer injury in fact should bring that challenge, and that is the time and place for a Court to exercise judicial review.

So one of the themes of my argument is the Government is not arguing in this motion to dismiss that the President's action is unreviewable. Our essential argument is, again, a time and a place but not here, not now.

This is not a constitutional crisis like the steel seizure case. This is not some grand situation that requires courts to bend the rules. As my colleagues at API have cogently documented in pages 8 through 12 of their motion, there's a four-stage process before any exploration, any drilling occurs in these -- in the outer Continental Shelf.

And Congress in Section 1349 of Title 43 has provided multiple times and places for judicial review of that action to take place. And we think that those are the appropriate avenues for judicial review to take place.

So to address ripeness first, constitutional ripeness, of course, is a component of the injury in fact required for a plaintiff to have Article III standing. As stated in the classic formulation by the Supreme Court in Lujan versus Defenders of Wildlife, the irreducible minimum injury is one that is concrete and particularized and actual or imminent, not conjectural or hypothetical.

And so ripeness concerns the latter half of that formulation; that is the timing of the alleged injury. And regarding that timing, the Supreme Court has said "allegations of possible future injury do not satisfy the requirements of Article III, a threatened

injury must be certainly impending to constitute an injury in fact."

And plaintiffs cannot satisfy that requirement of imminent certainly impending harm. If we take the harm that they themselves have alleged, and they've succinctly stated that on page five of their opposition, this executive order, quote, "injures plaintiff's members because opening areas to disposition under OCSLA threatens harm from oil and gas activities, including seismic surveying."

If we put aside seismic surveying for just a second, the other oil and gas activities are subject to that four-stage process. And not to steal my colleague's thunder, but there's a five-year leasing program, there's the lease sale itself, there's the exploration stage, and only then and finally development and actual production and drilling.

And those stages are successive. For example, Section 1344(d)(3) provides that no lease shall be issued unless it's for an area within the improved five-year leasing plan. So you have to have leasing plan first, then the lease, then, as documented in my colleague's motion, other plans, other permits before any of that can happen.

What's the timing of that? Plaintiffs don't

really contradict the documented fact that the very first of those stages is only just getting going. In July, the Interior Department filed a Federal Register notice merely soliciting information and requesting comments on the preparation of a new five-year leasing program.

And that program is for 2019 through 2024. So I think plaintiffs effectively concede on pages 21 and 22 of their opposition that harm from drilling itself is not imminent because it's contingent on these multiple stages.

Now, they rely also on seismic surveying, and I have two points regarding that. That's -- one, as a matter of fact, that's not imminent or certainly impending either. The closest plaintiffs come to that is to say that companies have already sought federal authorization and the government has advanced eagerness to speed development. That's on page 21 of their brief.

But on page five of our reply brief, we've cited authority for the fact that the only operators to apply for seismic survey permits proposed to conduct these activities in areas offshore in the Mid-Atlantic coastal states are from the area in the Atlantic withdrawn by President Obama.

So anything that's even close, these

applications aren't even -- don't even touch on the areas that are in dispute in this case.

And plaintiffs have not explained why they could not challenge in the manner prescribed by Congress and the Administrative Procedure Act or in OCSLA the permits that have to be issued before any seismic surveying may be conducted, and those permits are discussed, among other places, in Footnote 1 of the DC Circuit's decision in Center for Biological Diversity versus U.S. Department of Interior, cited in the briefs.

But second and more fundamentally, seismic surveying lacks a connection to the disputed executive order in this case. Seismic surveying is conducted under the authority of Section 1340 of Title 43, and is independent of leasing.

And the withdraw authority that we're fighting about in this case, the President's authority to, quote, "withdraw from disposition any of the unleased lands of the outer Continental Shelf," unquote, is provided by a separate statute, namely Subsection (a) of Section 1341.

So really the upshot is that surveying is authorized by a separate statute regardless of what lands are withdrawn or not withdrawn. So it can go forward regardless of the legality of the challenged executive order.

So to go back to the terms of standing, plaintiffs failed to show that their alleged injury is fairly traceable to -- the alleged injury from seismic surveying is fairly traceable to this executive order.

So in sum, on this point, plaintiff's alleged injuries are not imminent, they're not certainly impending, in a word there, they're unripe, and they lack Article III standing.

So if we turn to another aspect of standing, the Supreme Court has said, as I quoted before, "the injury has to be concrete and particularized." And we think that the Supreme Court's decision in Summers versus Earth Island Institute is apropos on this point. In that case, the Court denied standing to a challenge about national forest regulation observing that national forests occupy more than 190 million acres, an area larger than Texas.

The Court said there may be a chance, but there's certainly not a likelihood that plaintiff's wanderings will bring him to a parcel about to be affected by the alleged unlawful regulations.

And here the subject, the area subject to the executive order is similarly enormous. Plaintiffs themselves allege 128 million acres in their Complaint. And absent any five-year leasing program, absent any

lease sales, absent any exploration plans, there's similarly no basis for this Court to find a likelihood that the plaintiff's wanderings will bring them to particular areas that will be ultimately affected by the executive order.

Of course, plaintiffs rely on the Ninth Circuit's decision in Center for Biological Diversity v Kempthorne escape this conclusion. But in that case, the Ninth Circuit -- the affected area in that case was large. It was in and along the Beaufort Sea on the northern coast of Alaska, but the Ninth Circuit said nonetheless, that was a geographically specific area.

I think important to the decision to find standing in that case was the fact that the challenged regulations there have been and continue to be implemented such that the alleged injury was imminent.

Here, given the four-stage process, nothing is imminent. There's been no actual implementation of authority in these disputed areas. So we think that in addition, plaintiff's injuries are not concrete and particularized.

That brings me to sovereign immunity. And I think we're in agreement, and, for example, the Ninth Circuit's fairly recent case in Consejo de Desarollo, cited in our briefs, makes clear that when federal

defendants are sued in their official capacity, and, of course, that's exactly the capacity alleged in the caption of plaintiff's Complaint here, sovereign immunity bars that suit unless there's been a waiver by Congress.

Now, plaintiffs invoke the so-called ultra vires exception derived from Supreme Court's decision in Larson v Domestic Foreign Commerce Corporation. The Supreme Court made clear that there must be a wholesale lack of delegated power and a mere, quote, "claim of error in the exercise of that power is therefore not sufficient."

I submit, Your Honor, that we're not in a situation where the President or the secretaries are acting wholly outside the powers that the statute has given them. There is a dispute. There's claim of error, and as we say, eventually that will be litigated.

Eventually a Court will be able to make a ruling on that, but only in the forum and under the exception, under the waiver of sovereign immunity that Congress has provided, either in the Administrative Procedure Act or in OCSLA itself.

So eventually, plaintiffs will be able to make the argument, and I'm quoting from 5 U.S.C. Section 7062, that the President's -- that the defendants have

taken action that is, quote, "not in accordance with law," or that is in, quote, "excess of statutory jurisdiction, authority or limitations." That's the waiver of sovereign immunity in the APA.

But of course, plaintiffs don't rely on that, because they can't satisfy the final agency action requirement, or similarly, the requirements in OCSLA itself, 43 U.S.C. 1349.

So the last of these four doctrines is the lack of cause of action. And plaintiffs have not been able to point to any statute by which Congress has authorized them to bring suit at this time and in this place. They cite some cases in which the Supreme Court has reviewed presidential action, but many of those cases, like NLRB v Noel Canning, arose in the course of a statutorily authorized review. In that case it was 29 U.S.C. Section 160(f).

But there's no similar statutory right here. Of course they rely on Hawaii v Trump and similar cases, but the Supreme Court last month vacated those decisions, and the Ninth Circuit itself just last week vacated its own decision and ordered the district court to dismiss those cases.

THE COURT: But not for lack of standing. Wasn't it mooted out by a new order?

MR. GRANT: It was mooted, Your Honor. I guess to say those cases aren't authority for a waiver of sovereign immunity.

And again, plaintiffs cite cases like the steel seizure case from the 1950s, where it looks like the Supreme Court is bending the rules a little bit because it's worried that otherwise, presidential action will go unreviewed, President Truman's seizure of the whole steel industry.

But that's not the case here. Congress has waived immunity. It has done it in a time and place under prerequisites that plaintiffs simply do not wish to follow.

So the last -- my last point, Your Honor, is of course we've asked that the entire action be dismissed, but if Your Honor doesn't give us that complete relief, we'd like the lesser relief of dismissing the President personally.

And that, of course, we rely on authorities collected in the district court's decision in Newdow v Bush, that courts have no authority to issue declaratory or injunctive relief against a co-equal branch like the President.

In response to that argument, I think plaintiffs expressly disavow any such intent to get such

relief. They say on page 16 of their opposition, "Plaintiff's relief does not require an injunction against the President."

On the next page, they say conversely, "Plaintiff's arm can be redressed by an injunction against the defendant secretaries." And they make a similar statement on page 18.

So in response to our motion, plaintiffs have clearly disavowed any request for relief against the President as opposed to the secretaries. And so we ask, if the Court is not inclined to dismiss the entire case in light of the separation of powers, concerns that we've raised and plaintiff's I think effective concession that they can get relief against the other defendants, the President should be dismissed.

THE COURT: Thank you.

MR. ROSENBAUM: May it please the Court, my argument is going to focus on a single issue, which is: Does this lawsuit belong here or in the DC Circuit. It's a 12(b)(1) issue.

In considering that argument, the key factor to recall is the Ninth Circuit's admonition in Nuclear Information that any doubt should be resolved in favor of the court of appeals having jurisdiction. I think we're going to provide much more than just some doubt.

I think we're going to establish it's clearly the case.

The OCS Lands Act is highly structured. There are four stages. The first stage is the five-year program. That determines what areas are going to be available potentially for leasing. They may not later be leased, but they are the areas that are potentially available for leasing.

It is, in the words of the DC Circuit, where key national decisions are made. And there's only one court in the country that has jurisdiction, and that's the DC Circuit. It's not just it's the court of appeals. There are lots of statutes that provide for jurisdiction directly to the court of appeals.

It's one specific court of appeals, and this was a very considered decision by Congress. They wanted one court to make a unified decision and that was going to be it. And that was going to resolve any judicial challenges to the questions on what areas can be made available for leasing.

The withdrawals present the exact same issue, what areas can be made available for leasing. It's the same question. Indeed, if you look at the withdrawals, and I reference to Government Exhibits 15, 17, 18, these are -- these are the Obama withdrawals. They are memorandum for the Secretary of the Interior. That's

their verbiage. Why? Because they are directions to the Secretary of the Interior as to what areas he cannot consider for the five-year programs. That's what they are.

And indeed, President Trump's executive order also is a memorandum to the Secretary of the Interior altering the previous withdrawals. The two obviously are closely intertwined, the withdrawals and the five-year program. And that's the test, that's the standard that the Ninth Circuit looked to in the CEC case.

Now, the plaintiff's response is it's true that 1349(c)(1) provides exclusive jurisdiction to the DC Circuit, but it's referencing leasing programs, not withdrawals. And that's true, but that simply brings you to the Yeutter line of cases by the Ninth Circuit and thereafter, where the Court grapples with the question "What happens when you're dealing with a decision that is closely intertwined with the decision that is exclusively before the court of appeals but not explicitly so?"

And what the Ninth Circuit said in Yeutter is that that preliminary closely intertwined decision also goes to the court of appeals. It was, if you will, an extreme case. It was a decision by the Forest Service

as to certain decisions it was making regarding the use of federal lands. Those lands were going to be used with respect to a hydroelectric plant licensed under the Federal Power Act. The Federal Power Act says any review of licensing decisions go to the court of appeals.

Well, the plaintiffs in that case said, we're suing the Forest Service, we're not suing FERC. We're not raising claims under the Federal Power Act, we're raising NEPA claims, and we're raising other types of claims, Indian rights statute claims. So we're in district court.

The Ninth Circuit said no. The Ninth Circuit said that that too is subject to exclusive jurisdiction of the court of appeals because it was an intertwined decision and it was a decision, the Forest Service decision, that had no significance outside the FERC licensing process.

That was why the Forest Service was making the decision, and that the lawsuit's ultimate purpose was to block the construction of the hydroelectric facility, which was a FERC licensing issue.

Same thing here. The withdrawals have no significance except to the effect -- except to the extent they affect what can be included in five-year

leasing program. And the ultimate desire by the plaintiffs, which they are actually explicit about, is they want to restrain what areas can be made available for leasing through that five-year program in the later stages. So this is Yeutter all the way.

The court in Yeutter also said that Congress obviously did not want a party to have to, in their terms, grind through the district court and then go to the court of appeals. There obviously was a desire by Congress for expeditious treatment.

Here, it's even stronger. First of all, the OCS Lands Act itself says, we want -- this is 1331(c) -- expeditious development. So they're actually using the statute, the OCS Lands Act, the very language they used in Yeutter. But beyond that, here it's not just, with all due respect to the Ninth Circuit, that these issues are supposed to go to the court of appeals, they're supposed to go to a different of court of appeals. They're supposed to go to the DC Circuit.

And the practical reality here is huge. As counsel for the federal government explained, the administration is right now drafting a new five-year program that's going to go -- that plans to go into effect in 2019, year after next.

Part of the statutory obligation of the

secretary is to decide how do I balance among the regions and decide which ones ought to be made available for leasing. There's a whole slew of criteria. That decision, when it comes out, which will presumably be in 2019, is reviewable solely by the DC Circuit, and yet under the plaintiff's scenario, any decision by Your Honor will be before the Ninth Circuit at the same time.

You'll have the DC Circuit grappling with the question of what's the proper balance among the regions for leasing at the same time the Ninth Circuit is dictating what areas are available for leasing.

That's exactly the kind of conundrum that Yeutter said was to be avoided, and Yeutter wasn't even dealing with the situation where there was one specific court of appeals that was designated for resolution of these kinds of issues.

THE COURT: So in determining which lands should be leased, where would I find the criterion or criteria that the agency is to consider, and does it address -- does it reference at all withdrawn lands that are put back into the mix?

MR. ROSENBAUM: There's no -- the answer to the second question is no.

THE COURT: It was a compound question.

MR. ROSENBAUM: And the criteria --

THE COURT: Where I would find -- are there regulations that set out how you figure out which lands to offer up for lease?

MR. ROSENBAUM: Yes. It's in Section 1334 of the statute.

THE COURT: It's in the section?

MR. ROSENBAUM: It's in the section.

THE COURT: That was my question.

MR. ROSENBAUM: And it's a consideration of, for example, equitable sharing of development, benefits and environmental risks among agents. But that's one of several criteria, but that's where it's found.

Now, I will also point out that in Yeutter it was -- in Yeutter the Forest Service decisions were held reviewable only in the court of appeals, even though they were decisions that were being challenged under completely different statutes in the Federal Power Act. They were being challenged through NEPA, et cetera.

Here the withdrawal is in the OCS Lands Act. I mean, it's in the same act. So if Yeutter was correctly decided, which of course it was, then the DC Circuit has the jurisdiction here. And Yeutter is one case. We cite many others in our brief.

Now, plaintiffs argue, well, our claim here is it's ultra vires, as if that cures things. We think it

doesn't for two different reasons. First of all, we think the law is clear that even if it were ultra vires, you would still have to use the jurisdictional parameters of the OCS Lands Act to decide what court gets to resolve whether it's ultra vires or not. That's what FCC v ITT said. That's a Supreme Court decision.

The argument was that the FCC acted ultra vires. They sued in district court, and the Supreme Court bounced it, saying, "No, no, FCC decisions are reviewable in the court of appeals. It doesn't matter that you're claiming this ultra vires action. That's where it's heard."

And a case that plaintiffs themselves cite, Noel Canning, a recent decision where actually the action was held to be ultra vires, and this relates to the recess appointments issue, but it related to the action of the National Labor Relations Board. And the determination whether or not they acted ultra vires, went in the first instance to the court of appeals, not to a district court.

Why? Because decisions of the National Labor Relations Board are reviewed in the court of appeals by statute. And the mere fact it was a claim that their action was ultra vires, as indeed it was ultimately found to be, had no bearing on which court had

jurisdiction to resolve the matter.

And all of what I've just said presupposes that their claim can reasonably be characterized ultra vires. We absolutely dispute that. We have a -- this is not steel seizures. I mean, we have a statute in the OCS Lands Act that addresses withdrawals by the President. That's a grant of authority that Congress has given to the President.

We have a long history, as we lay out in detail, of that power being exercised in a way that is not permanent or irreversible, which is the plaintiff's position, that the power is permanently irreversible. It's neither, based on practice. We have cited numerous cases in which Presidents either only made the withdrawal temporary to begin with, or in which other Presidents later came in and changed those earlier withdrawals.

Of course the "from time to time" language of the statute provides some reasonable indication that that was the intent. We cited other statutes, the fact that from time to time there can be establishment of inferior courts, which surely doesn't mean we're limited to the district courts that were established in 1791 or whenever the first district courts were established.

So for these reasons, we think it's clear this

is a statutory interpretation case where there's discretion, where there's a history of conduct, and ultimately, for those reasons, we think we will succeed on the merits, but for present purposes, it's merely sufficient to conclude this is a question of what the statutory authority is.

And that means that the lawsuit is under the OCS Lands Act. It's a claim there's been a violation of OCS Lands Act. 1349(a)(6) says that claims of violation under the OCS Lands Act are to be pursued pursuant to the jurisdictional provisions of the OCS Lands Act.

The only provision of authority to district courts is over things like violations of permits or impropriety in conducting operations, none of which obviously relates to the question of what areas are to be made available for leasing.

That is covered by 1349(c)(1), and jurisdiction is provided exclusively to the DC Circuit for that.

THE COURT: Thank you. Mr. Grafe?

MR. GRAFE: Good morning, Your Honor. I would like to address ripeness and standing. My colleague, Mr. Lawrence, will then address cause of action and waiver of sovereign immunity.

THE COURT: All right.

MR. GRAFE: First I would like to emphasize the

significance of President Trump's order. The order purports to change the status of the Arctic Ocean and the Atlantic canyons from permanently closed to oil and gas development to open for such development. So in other words, where the waters were absolutely protected from offshore oil drilling, they're now open for leasing, exploration and development under the Outer Continental Shelf Lands Act.

This change threatens harm to the plaintiffs. Most immediately, it threatens harm from the seismic surveying that opening those areas catalyzes.

And the plaintiff --

THE COURT: Do you agree with the reply brief that pointed out that the seismic surveying is not part of the leasing program?

MR. GRAFE: That's right. And that's why it can happen, and it precedes the four stages. And in fact, that's why plaintiffs have alleged detailed factual allegations in the Complaint that demonstrate that the harm to them from the seismic surveying that will be catalyzed by the fact that now these are open to this position, will cause them imminent harm that's concrete and particularized.

THE COURT: But the executive order didn't impact the seismic -- I understand your catalyzation

argument, but it really didn't prohibit -- President Obama's order didn't prohibit seismic surveying, did it?

MR. GRAFE: It did not, but since those areas were closed for oil drilling, there was no incentive for any of the companies to conduct seismic surveying there, whereas President Trump's order opening them up was greeted with an industry press release that said -- from the seismic industry group, that said this is great, we want to do seismic there, quote, "without delay to inform our decisions for the five-year plan."

And in the Atlantic, there already are pending seismic survey permit applications, and they do cover areas affected by President Trump's order, contrary to the Government's brief.

We allege that at paragraph 41 of our Complaint, and if you were to look at the exhibits attached to the intervenor's reply brief, they show -- they have a map on the last page of each of the exhibits, and that shows these large-scale seismic surveying that the industry wants to conduct. It shows, if you compare that with a map of the withdrawn areas, there's overlap in several of them.

So it's incorrect to say that it doesn't affect the areas in the Atlantic. Of course, in the Arctic, the whole area was closed to drilling before. Now it's

open, so that has a clear effect there.

And we allege that, you know, when courts look to determine imminence, it's a common sense inquiry. And the test is whether as a practical common sense matter the decision that's being challenged creates a substantial risk of harm.

And here, you know, courts will look to motivation and past behavior. And I've described the motivational effect. And the past behavior also confirms the imminence of seismic surveying. In 2016, the National Marine Fisheries Service did an EIS assessing noise impacts in the Arctic Ocean. It predicted that there would be multiple seismic surveys for multiple years if that area was opened to oil and gas drilling.

And in the past in the Arctic, the oil companies have conducted seismic surveying several years in advance of leasing, which puts them right in our window.

Now, the Government's argument that the harm isn't imminent because it requires future permitting and intervening steps is unavailing because the presence of intervening steps doesn't defeat imminence, because again, the question is does the challenge decision create a substantial risk of those intervening steps

happening.

And so, for example, in cases that assess this, like Carpenters Industrial Council, the DC Circuit found that timber companies could challenge the designation of critical habitat in the national forest, even though the harm that they claimed, which was economic harm due to lost timber supply, wouldn't happen but for a few intervening steps.

There would have to be a forest -- a timber sale by the Forest Service that would provide only a reduced amount of timber. The company would have to be unable to fulfill the amount of timber it needed from that sale. It would be unable to substitute that from a different source.

All of that has to happen before the harm accrues. But the Court nonetheless, calling it a common sense inquiry, determined that the timber companies had standing to challenge that broad decision. And the Ninth Circuit has undertaken a similar analysis in Oakland versus Lynch in which the City of Oakland sued the federal government to stop their foreclosure petition on a marijuana dispensary claiming lost tax revenue as harm.

There, before the harm accrued, a Court would have had to grant that foreclosure motion and the

cannabis sales in the City of Oakland and the City of Oakland tax would have to have been diminished meaning the other cannabis dispensaries didn't pick up the slack and the new tenant of the building would have to pay less tax to the City.

So these intervening events are accepted by the Courts as not making things not imminent. And so to here where really all that has to happen is the seismic companies have to apply to do seismic and the government has to grant those permits, and the government has been directed by the President and the Secretary of the Interior to grant permits expeditiously, and the industry has said, "We would like to do seismic surveying without delay in the Atlantic and in frontier areas."

And so for these reasons, plaintiffs have alleged detailed facts that demonstrate that their harm is imminent and that it is connected to the decision here at issue.

Plaintiffs also have met the nexus test between the use of the Arctic and the Atlantic and the harm from the President's order. And again, that's because they've alleged at paragraph 15 of their Complaint that they have members that use the areas, different parts of the areas that will be affected, and that they use

marine mammals that rely on those areas. And they've alleged harm from seismic surveying, which has wide effects.

So that makes it quite different from a case like Summers where the challenged decision was small post-fire timber sales across the national forest and the plaintiffs couldn't connect their use of the forest with those discreet harms.

Here the harm is broad and will affect a broad area, and plaintiffs use those areas and have connected their use to that. So an example of the difference of these things can be seen in a case that this Court decided a few years ago, Kunaknana, which dealt with a drilling plan in the Colville Delta. In that case several of the plaintiffs were found not to have standing because they couldn't connect their use of the area to that specific project.

But at Footnote 160 of that opinion --

THE COURT: It's a long opinion.

MR. GRAFE: It was.

THE COURT: Footnote 160. All right. Go ahead.

MR. GRAFE: At that footnote, the Court recognizes the difference between small-scale harms and larger-scale harms, and cites a case, the Defenders of

Wildlife versus EPA, 420 F.3d at 957, which is a Ninth Circuit case in which the Ninth Circuit found that plaintiffs who alleged that they used and observed endangered species in the state of Arizona had a geographic connection with the decision they challenged, which was that delegation to the state which would reduce protections under the Endangered Species Act for that. It's because the challenged decision had a broad effect, it was connected to the plaintiffs' use of a broad area. And so too here.

Finally, I'll address very briefly the doctrine of prudential ripeness, which is discretionary, and so the Court need not even apply it. And in fact, the Ninth Circuit has declined to apply it. And I'll give a citation in a case called McClung v City of Sumner, 548 F.3d at 1224, in which the Ninth Circuit said, well, it's discretionary, we're going to move right past it.

But if the Court does apply the doctrine, plaintiffs easily meet it here. The doctrine asks two questions. One, is the claim fit for immediate decision. And our claim is because it raises strictly legal issues, which is whether the President had authority to undo the withdrawals.

And despite the Government's assertion in its reply, the question doesn't require any further factual

development to answer. The salient facts about the Executive Order's lawfulness are known today, and further agency action at the five-year plan stage of the leasing stage won't inform that.

And the plaintiffs also would suffer a hardship if made to wait until these later stages, again, because the executive order itself will catalyze seismic surveying that will harm the plaintiffs and that seismic surveying is done specially to inform those later stages, whereas the Government and industry cannot demonstrate that they will suffer any hardship if the case is adjudicated now. And in fact, it may spare them the trouble of doing a five-year plan for an area that's determined later to be closed if the order is unlawful.

For all of these reasons, I would urge the Court to find that we have standing and that our claims are ripe for adjudication.

THE COURT: All right. Thank you.

MR. GRAFE: Thank you very much.

MR. LAWRENCE: Your Honor, again, I'm Nathaniel Lawrence for the plaintiffs. I think I would like to start by addressing the cause of action.

The Government's position here is that the plaintiffs need to statutorily provide cause of action. That's not the case and the Supreme Court has never so

held.

The case that they principally rely on here is Sandoval and its kin deal with situations where Congress has created the obligation that's being enforced. That's not our situation. We're seeking here to enforce an obligation that arises under the U.S. Constitution.

In Sandoval-type cases where Congress has created the statutory obligation, it makes sense to ask whether Congress intended for there to be a private right of action to enforce.

And those cases also involve enforcement against third parties, where it makes sense to ask whether enforcement by third parties, by private parties might unnecessarily suppress commercial activity or trench on the prosecutorial discretion of the federal government.

That's not the situation we're in here. We are asserting an obligation that arises under the Constitution. It doesn't make any sense to ask whether Congress not having created that obligation concurrently created a cause of action for it.

And where you're not suing -- there's not a question of suit against a third party. It doesn't -- where it's a question of suit against a federal officer acting assertively in his or her official capacity, it

doesn't make a lot of sense to ask whether the enforcement of that obligation ought to be left entirely up to the federal government.

The situation we're in is the one squarely addressed by the Supreme Court in Free Enterprise Fund, a case cited in our brief. That's a case where a statutory scheme created causes of action with jurisdictional restrictions, but that wasn't the claim that the plaintiffs brought. They didn't have a claim under the Administrative Procedure Act, because there wasn't any final agency action.

Nonetheless, the Supreme Court heard and upheld their claim that the board they were challenging was created ultra vires under the Constitution.

In doing that, the Supreme Court said, even the Government doesn't dispute that there are causes of action that arise directly under the Constitution, and the Court expressly found that claims arising under the separation of powers were among such causes of action.

I think it's worth noting that even the author of the Sandoval that the Government relies so heavily on subsequently himself in another majority opinion noted that, quote, "The ability to sue to enjoin unconstitutional actions by state and federal officials is the creation of courts of equity and reflects a long

history of judicial review of illegal executive action."

That's Armstrong versus Exceptional Childcare Center. It's 135 Supreme Court at 1384. The dissent in that case reaffirms that principle and says the plaintiffs were just, quote, "simply pointing to background equitable principles authorizing the action." That's at the same case at 1392.

Let me talk quickly about sovereign immunity. I don't think this is a big issue in this case. The Supreme Court case law is quite clear that when the allegation is that a federal official is acting ultra vires that sovereign immunity doesn't attach, so you don't need a waiver from it. That's the Larson case and many subsequent cases.

The government objects that our case is, quote, "addressed to the President in his official capacity," but that's always true in cases like this. You are suing a federal official who has acted in his or her official capacity ostensibly with authority that he or she doesn't have. That's the nature of these cases.

In fact, the Ninth Circuit in State of Washington versus Udall described such cases as, quote, "a suit against a government officer in his official capacity," unquote, and therefore, quote, "not a suit against the sovereign," unquote. That's 417 F.2d at

1314, a 1969 case.

THE COURT: So with regard to the Government's position on having the President removed as a defendant, as I understood your briefing, you're not seeking an injunction against the President, correct?

MR. LAWRENCE: We do not believe that you have to issue an injunction against the President. I think your ability to do that is an open question. But you do not need to do that to afford at least partial relief.

THE COURT: And so then with regard to his dismissal, what's the plaintiffs' position?

MR. LAWRENCE: Well, the action here that causes the harm, and the action that violates the Constitution is the President's, so he's a proper defendant. And Presidents do get sued. They get sued for declaratory relief, and that's what we're looking for here.

That proposition I think is beyond doubt, certainly in this day and age. I think if you dismiss the President, we would not have -- we would not have a current cause of action. So I think he is not only "a," but the necessary party in this case.

THE COURT: Thank you.

MR. LAWRENCE: Let me talk a little bit about the argument that this case somehow falls under the

citizen provision of OCSLA.

The industry, the intervenors here argue that what President Trump did is part of the OCSLA process. It's really not. It was an independent action by an independent official not named in OCSLA, not named in the relevant sections of OCSLA.

And it has independent force and effect, as my colleague explained. Changes the world now.

It was undertaken prior to any administrative process that's described in the citizen provision. And that citizen pursuit provision is really quite narrowly tailored.

THE COURT: So what's your response to the argument from the Government that if this case were to go forward, then you could end up with parallel proceedings going on in the DC Circuit?

MR. LAWRENCE: Well, one thing that would not be happening is the Ninth Circuit dictating anything about leasing. That was dictated by President Obama's withdraw under Section 12(a) of OCSLA.

If the Ninth Circuit finds that it's unconstitutional, it finds it's unconstitutional, but presumably that decision would not be so delayed as to trench on any consideration by the DC Circuit of a five-year leasing program that takes two to two and a

half years to develop and a process that has not yet commenced.

I don't think there's any real world concern here, nor do I think the two courts, if for some reason it dragged on that long, would be unable to coordinate their decision. I just don't see that as a real world consideration at all.

I do want to stress that 1349 Section (c), the section that directs some claims under OCSLA to the appellate courts, is a very narrow provision, that the statute itself, the citizens provision in OCSLA itself calls it an exception. 1349(b)(1) says, "except as provided in subsection (c), everything goes to the district courts."

And the 1349(c) describing the cases that go to direct appellate review is very precise in its terms. Those are cases that involve decisions by the Secretary of Interior. They are made after an administrative process. They are heard solely on the record made in that administrative process. And 1349(c)(7) says appellate jurisdiction doesn't even attach until the filing of the record, which is an impossibility in this case because there's no record. There was no administrative proceeding. So it's really a very narrowly tailored provision.

I think it's also -- I think it's worth noting that the statute itself also preserves jurisdiction, causes of action and the normal jurisdiction to hear them that are not enumerated in 1349(c), anywhere in 1349.

1349(a)(6) says, quote, "Nothing in this section shall restrict any right which any person may have under any other Act or common law to seek appropriate relief." That's a savings clause that squarely covers the situation that we are in.

I want to take a minute if I can to address the Yeutter line of cases, the intertwined argument that first appeared in intervenor's reply brief. Those are cases that deal with subsidiary actions by the same or another agency that are statutorily required as part and parcel of an ongoing administrative process.

Challenges to those subsidiary actions are challenges to the decision in chief. They have no other function, they have no other force and effect, and they are heard in the same forum that Congress directed for the decision in chief.

Those cases just don't have any relevance here where we're challenging a presidential decision of independent force and effect that was made prior to and apart from any of the processes that are named in 1349.

Yeutter involved a letter that the FERC had to obtain per Section 4(e) of the Federal Power Act in order to go ahead with what was it doing. Without that letter, it couldn't proceed. Same thing is true of the other cases that the intervenors cite.

There's one exception to that. That's the California Energy Commission case that my colleague here referenced. That's a case that involved a citizen supervision which was very different from this one, a citizen supervision which specified jurisdiction in the appellate court to hear claims by, quote, "any person who will be adversely effected by any one of a set of enumerated decisions."

So it wasn't limited to the decisions themselves, but to anybody who was adversely effected by them. So in that case, the plaintiffs were adversely affected by one of the enumerated decisions. They sought a waiver from it. When the waiver was denied, then that adverse effect was made good to them.

And the Court found this is a case that belongs, because by the very terms of the citizen supervision, it belongs in the appellate court. The Court said that the denial of the waiver was, quote, "qualitatively no different from challenges to the decision in chief," that was listed in that citizen

provision. That's 585 F.3d at 1150.

There's also a series of cases cited in the reply brief by the intervenor that talk about resolving the ambiguity in favor of the court of appeals jurisdiction. They didn't raise it at the argument here, but because we didn't get an opportunity to respond, I want to point out that those cases all deal with a patent ambiguity in the citizen supervision. There is no such ambiguity here. They haven't identified any relevant ambiguity.

What they argue is that you ignore cases they themselves cite, which say jurisdictional provisions have to be strictly construed. They want you to ignore that admonition and go beyond the language of the statute and find that an action that is not mentioned in their citizen provision is somehow caught up in it. That's not a question resolving ambiguity. That's a question going belong the language of the statute, so those cases that talk about resolving any ambiguity in favor of Court jurisdiction simply don't apply.

THE COURT: All right.

MR. LAWRENCE: If you have no questions --

THE COURT: Not at this time. Thank you.

MR. LAWRENCE: Thank you very much.

MR. GRANT: Your Honor, I think we might have

taken our full 30 minutes.

THE COURT: If you have two minutes of things you really need to say, that's fine.

MR. GRANT: I of course do.

THE COURT: I knew you would. Go right ahead.

MR. GRANT: I thought I heard my colleague say that imminence doesn't require temporal proximity. That makes no sense to me. For something to being imminent, it has to be soon.

Our argument is not just count up the number of steps, if all of those steps happen tomorrow the injury could be imminent, but these steps are going to play out literally over years.

In fact, Counsel just said, if I heard him correctly, there's, quote, "no real world concern here, because this five-year program is going to take a long time to even get off the ground." So I think our point is this is not imminent injury.

One of my colleagues also said this harm is broad and will affect broad areas. We just don't know that until the process plays out. Until we get the five-year leasing program, until we get the individual leases, we don't know what areas will be affected. So to say it's broad is just speculative at this point.

As to whether there's a cause of action, I

don't of course want to get into the merits, but I'm not sure this is a constitutional cause of action. As I understand the plaintiff's complaint, they're saying that the President took action not authorized by this statute, contrary to the terms of this statute.

Judge, if you read the statute, he couldn't do what he purports to do. So, to me, it seems like a very generic statutory cause of action, so to put it in -- to gussy it up as a constitutional cause of action merely by saying the separation of powers would turn all of these statutory issues into so-called constitutional issues.

THE COURT: I think they cite the property clause, as I read it, in the first claim for relief of the Constitution. Accords to Congress the power to dispose of and make all needful rules and regulations respecting the territory or other property.

MR. GRANT: They do, Your Honor. And Congress has obviously in Section 1341(a) -- and this brings me to another point, that the President is mentioned by name in this statute. "The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf."

So using its property clause powers, Congress

has delegated power to the President. Did he exceed those powers? That's a question some court will have to review at some point, but we say not here.

As for sovereign immunity, as I understand the plaintiff's argument, any time a statutory violation is alleged that's the ultra vires exception, it seems to us that that exception is going to swallow the rule.

And the last point about jurisdiction in 1349(b) versus (c), whether a case could go to the district courts under Subsection (b), many cases can and will, but of course not this case where there hasn't been final agency action.

So I think my colleague's argument about the court of appeals is sound, but if Your Honor disagrees and thinks that this fits under Subsection (b), fine, the final agency action requirement still applies and plaintiffs haven't met it. So for those reasons, we urge the Court to grant the motion.

THE COURT: All right. Thank you. Very well briefed all around. I appreciate that. I'll take it under advisement.

Anything further at this time? Nothing further? Thank you all. We'll go off record.

DEPUTY CLERK: All rise. This matter is now adjourned. Court stands in recess until 1:30.

(Proceedings concluded at 11:02 a.m.)

CERTIFICATE

I, Sonja L. Reeves, Federal Official Court Reporter in and for the United States District Court of the District of Alaska, do hereby certify that the foregoing transcript is a true and accurate transcript from the original stenographic record in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 31st day of July, 2019.

/s/ Sonja L. Reeves
SONJA L. REEVES, RMR-CRR
FEDERAL OFFICIAL COURT REPORTER